IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1279

MARY ELIZABETH BLETHROADE SUTT, et al.,
Petitioners,

vs.

THE FIRST NATIONAL BANK OF KANSAS CITY, et al.,
Respondents.

No. 74-1370

LAKESIDE HOSPITAL ASSOCIATION, et al.,
Petitioners,

vs.

THE FIRST NATIONAL BANK OF KANSAS CITY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

SEPARATE RESPONSE TO PETITION FOR A WRIT OF CERTIORARI BY RESPONDENT JOHN C. DANFORTH, ATTORNEY GENERAL

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The respondent John C. Danforth, Attorney General of Missouri concurs that a Writ of Certiorari should be issued to review the judgment of the Supreme Court of Missouri in the case of *The First National Bank of Kansas City* v. *John C. Danforth, Attorney General of Missouri, et al.*, in regard to the *sole issue* of whether or not the selec-

tion of beneficiaries under the provisions of the charitable trust created under the last will and testament and first codicil of Homer McWilliams, deceased, will result in unlawful discrimination based upon race, in violation of the Equal Protection of the Laws as set forth in the Fourteenth Amendment to the Constitution of the United States.

OPINION BELOW

The opinion of the Supreme Court of Missouri, not yet published, appears in Appendix A to the Petition herein at A1-A31; the Opinion and Judgment of the trial court not to be published, appears in Appendix B to the Petition herein at A32-A44.

JURISDICTION

The respondent adopts the jurisdictional statement of Petitioners Lakeside Hospital Association, et al.

STATEMENT OF THE ISSUE PRESENTED

Whether or not the selection of beneficiaries under the provisions of the charitable trust created under the last will and testament and first codicil of Homer McWilliams, deceased, will result in unlawful discrimination based upon race, for the reason that under the "sifting facts and circumstances test," there exists the requisite state action, in that the creation, administration, and enforcement of the charitable trust, necessitates the involvement of the State of Missouri through its statutes, elected officials and courts, and requires the exercise of powers possessed by the State of Missouri; thereby subjecting any action taken thereunder, to the constitutional guarantee of Equal Protection of the Laws as set forth in the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The Respondent adopts the Statement of Facts set forth in the petition of the Lakeside Hospital Association, et al., Petitioners, as hereinafter supplemented.

In the trial court, this respondent filed an answer to the petition for declaratory judgment brought by the respondent, First National Bank of Kansas City, taking the position that the phrase "born of white parents in the United States of America" was void as in violation of the requirement of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States; and therefore any racial limitation upon the charitable trust created by the last will and testament and first codicil of Homer McWilliams, deceased, should be declared null and void and stricken from the instrument. Subsequently, in the hearing in the trial court and at the specific request of its general counsel, this respondent also appeared on behalf of the Western Missouri Mental Health Center, a not-for-profit agency of the Division of Mental Health, Department of Public Health and Welfare of the State of Missouri, located in Jackson County, and was made a party defendant in the suit. As a result, a trial brief was submitted on behalf of Western Missouri Mental Health Center and an argument was made that the phrase "Protestant Christian Hospitals" was void and unenforceable. Thereafter, a decision was made by the Division of Mental Health, not to appeal the decision of the trial court. Thereafter, upon appeal to the Supreme Court of Missouri, this respondent was neutral in regard to whether or not the trial court erred in declaring certain hospitals as "Protestant Christian Hospitals."

REASONS FOR GRANTING THE WRIT

I. The Judgment Below Is In Conflict With Prior Decisions of the United States Supreme Court Involving the Question of Whether State Action Exists In the Area of Charitable Trust.

In *Burton* v. *Wilmington Parking Authorities*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), the operator-lessee of a restaurant located in a building owned by the state and otherwise operated for public purposes, refused service to Negroes. The Court found state action present and therefore the Fourteenth Amendment applicable, and set down a new formula of "sifting facts and weighing circumstances" to determine the degree of "non-obvious involvement of the state in private conduct" (*Id.* at 722.) Thereafter in *Evans* v. *Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373, (1966), there was an action for the removal of a city as trustee of a park and appointment of others to serve as trustee. The Will of one Senator Bacon devised the park to the City of Macon, Georgia to be used for whites only. The city kept the park segregated for many years. Subsequently, the individual members of the Board of Managers of the park brought the suit in a state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate asking that the city be removed as trustee and that the Court appoint new trustees, to whom title to the park would be transferred. A lower court of Georgia accepted the city's resignation and made a substitute appointment. The Supreme Court of Georgia affirmed. On Certiorari to the United States Supreme Court, it was indicated that only by "sifting facts and weighing circumstances" can it be determined whether the reach of the Fourteenth Amendment extends to a particular case. This Court held that the appointment of private trustees could not authorize segregation in the park.

Mr. Justice Douglas while writing the majority opinion emphasized the fact that since the park was operated by the city for such a period of time the mere transfer of trustees did not cause the park to lose its *"public character"* and it was indicated at 382 U.S. 301:

> "This conclusion is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature. It is open to every white person, there being no selective element other than race. Golf clubs, social centers, luncheon clubs, schools such as Tuskegee was, at least in origin, and other like organizations, in the private sector are often racially oriented. A park, on the other hand, is more like a fire department or a police department that traditionally serves the community. . . ."

It is submitted that similar reasoning is applicable to the case at bar in that the proposed beneficiaries of the Home McWilliams Charitable Trust are hospitals who are clearly performing a community service. Under such circumstances, it is illogical to argue that the beneficiaries of the Homer McWilliams Trust may not discriminate, but that the trustee of the Homer McWilliams Trust can in the selection of beneficiaries. Therefore, it is submitted that the judgment below is in conflict with the decisions of *Burton* v. *Wilmington Parking Authorities, supra*, and *Evans* v. *Newton, supra* and that this Court should grant Certiorari.

II. **Certiorari Should be Granted Because This Case Presents a Unique State Action Question In That The State In General Affords A Large Number of Benefits to Public Charitable Trusts, Many Of Which Are Not Provided To Ordinary Trusts.**

The argument that public charitable trusts are subject

to the requirements of the Fourteenth Amendment was well made in Clark, *Charitable Trusts, the Fourteenth Amendment, and the Will of Stephen Gerrard,* 66 Yale Law Journal 979, 1008 (1957) wherein it was concluded that the administration of a charitable trust must ultimately be characterized as state action. In this connection, there is numerous authority to support the proposition that the State of Missouri through its courts has given the Homer McWilliams Charitable Trust the right to have perpetual existance, the right to have ambiguous language construed, the right to have its instrument modernized through the doctrine of *cy pres,* and the right to have a trustee appointed and its accounts approved. In addition, the enforcement of the trustees' stewardship is given to the state's Attorney General. Also, the State of Missouri has given many tax benefits to the Homer McWilliams Charitable Trust. See Article X, Section 6 of the Missouri Constitution. Section 456.230, RSMo. Cum. Supp. 1973 has also been recently passed by the Missouri legislature to allow the trustees of a charitable trust such as the Homer McWilliams Charitable Trust, to reform the trust instrument in order to meet the requirements of the Federal Tax Reform Act of 1969, so that the trust will not be subjected to heavy taxes and penalties.

In this regard, the Court's attention is directed to the case of *Green* v. *Connally,* 330 F.Supp. 1150 (D.D.C. 1971), affirmed without opinion in *Coit* v. *Green,* 404 U.S. 997 (1971). This case was a class action suit brought by plaintiffs who were Negro parents of school children attending public schools in Mississippi, to enjoin U.S. Treasury officials from according tax exempt status and deductibility of contributions to private schools in Mississippi discriminating against Negro students. A three-judge court held that under the Internal Revenue Code, racially discriminatory private schools were not entitled to a federal tax exemption provided for charitable, educational institutions, and

persons making gifts to such schools were not entitled to the deductions provided in cases of gifts to charitable, and educational institutions. In addition, the court pointed out that it was open to serious doubt whether the privileges the common law accorded to charitable trusts were still available to trusts establishing racially discriminatory educational institutions. The Court reasoned that a charitable trust cannot validly be established for the accomplishment of a purpose contrary to public policy. Moreover, the Court cited cases eliminating or vitiating the enforceability of discriminatory provisions in the instruments establishing educational trusts.

As a result it is submitted that this case presents a unique state action question in that the State of Missouri affords a large number of benefits to Public Charitable Trusts many of which are not provided to ordinary trusts. Therefore, this Court should grant Certiorari to consider whether the charitable trust here involved will result in unlawful discrimination based upon race. Further, the Court should resolve whether under the "sifting facts and circumstances test" there exists the requisite state action in the monitoring and policing of charitable trusts to invoke the guarantees of the equal protection clause.

CONCLUSION

For the foregoing reasons this respondent concurs that a Writ of Certiorari should be granted to review the judgment of the Supreme Court of Missouri in regard to the *sole issue* of whether or not the selection of beneficiaries under the provisions of the charitable trust created under the last will and testament and first codicil of Homer McWilliams, deceased, will result in unlawful discrimination based upon race, in violation of the Equal Protection of the Laws as set forth in the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

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